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No. 96-1404

In The

Supreme Court of the United States

October Term, 1996

ERNESTINE LEWIS and SYLVESTER J. LEWIS,

Petitioners,

vs.

ALAMANCE COUNTY, NORTH CAROLINA, including its Board of Commissioners and Board of Elections,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Alamance is a county of 108,213 people in central piedmont North Carolina. (Petitioners' Appendix at p. 4 [hereafter cited as "PA-"]). Nearly 80 percent, 86,373, of the citizens are white and 19.2 percent, 20,822, are African American. *Id.* Of those of voting age, 18 percent are black. *Id.*

The Board of Commissioners consists of five members elected at large for staggered, four-year terms in partisan elections held in even-numbered years. (PA-36). Plaintiffs contend that this method denies African American citizens an equal oppportunity to elect candidates of their choice in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

Fifty-nine percent of the county's registered voters are affiliated with the Democratic Party, 32 percent are Republicans, and 11 percent unaffiliated. (PA-4). Nearly 94 percent of African American voters are registered as Democrats. *Id.* Despite Democrats' overwhelming advantage in voter registration, in 1994 when the facts were developed for summary judgment, three of the five commissioners were Republican, and from 1980 through 1992 the GOP had captured twelve of the eighteen seats elected to the board. (Respondents' Appendix at p. 3a [hereafter cited as "A-"]).

To support its motion for summary judgment, the county introduced the deposition testimony of *plaintiff's* expert, Byron Orey. The plaintiffs chose not to supplement that testimony, making Mr. Orey's regression analysis the only expert evidence before the court. The shortcomings of his work were the subject of much of the Fourth Circuit Court of Appeals' decision, and it is the court's discussion of his analysis that led to this petition for certiorari.

Mr. Orey analyzed each primary and general election from 1972 through 1994 in which an African American ran for commissioner — and those were the only elections he analyzed. The results of Mr. Orey's regression analysis are reproduced as an appendix to the district court opinion, showing his conclusions as to the percentage of black and white voters who voted for each candidate in the contests he studied. (PA-22-32). When, at his deposition, Mr. Orey was directed to those charts and asked to identify the "preferred candidates" of African American voters, he gave away the plaintiffs' case.

At first Mr. Orey testified that the preferred candidates were those receiving the most votes from black voters equal to the number of seats open, *i.e.*, if there were three seats being nominated or elected, the three candidates receiving the most support from black voters were their preferred candidates. (A-19a). When forced to acknowledge that 20 of the 31 candidates identified as "preferred" by this method had won their primary or election, Mr. Orey retreated to a new standard he called "strongly preferred," excluding those candidates who received less than 51 percent of the African American vote. (A-31a-36a). He then had to acknowledge, however, that 13 of those 22 "strongly preferred" candidates had won their primary or election. (A-42a).

Seeing his conclusion that minority-preferred candidates were "usually" defeated slipping away, Mr. Orey finally turned to another standard called "strongest preferred," limiting his identification of preferred candidates to those with the greatest support from African Americans in each election. *Id.* Still, the election results showed that 11 of the 17 "strongest preferred" candidates had been successful. (A-46a). Excluding party primaries and considering only general elections, eight of Mr. Orey's 11 "strongest preferred" candidates of black voters were elected. (A-8a-18a, 43a-45a).

This testimony from the plaintiffs' expert at deposition led the county to seek summary judgment. The county also offered uncontested evidence that African Americans had been elected to other offices in the county — the city councils for Burlington and Elon College and the county school board (encompassing a smaller and more white area than the entire county) — that an African American had chaired the three-member county board of elections or been a member for over 15 years, and that 22 of the 39 special voter registrars appointed by that board were black. (A-4a-6a). In response, plaintiffs chose to stick with Mr. Orey.

In moving for summary judgment the county argued that plaintiffs could not prove any of the three threshold elements of a Section 2 claim required by *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986): (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) "that it is politically cohesive," and (3) "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." The district court held, first, that there was a disputed question of material fact on the compactness of the minority district (PA-13),[1] and, second, that the black community in Alamance County is cohesive (PA-13). On the third *Gingles* element, however, the court held, based on the evidence of plaintiffs' expert, that plaintiffs could not show that the preferred candidates of black voters are usually defeated by bloc voting of whites. (PA-21).

1. Plaintiffs' assertion in their petition (page 5, note 4) that they "met their burden, for summary judgment purposes, to show the black population of Alamance County is geographically compact" is misleading. Rather, the district court simply found that without evidence of various quantitative measures of compactness it could not decide the issue, and that the "appearance of the district coupled with other evidence produced by both parties" established a question of material fact. (PA-12-13). Thus, contrary to plaintiffs' assertion, there remains an issue of racial gerrymandering in this case.

The Fourth Circuit Court of Appeals affirmed in a split decision. The portion of the decision that is the principal basis for plaintiffs' petition for certiorari is the holding that "the district court failed to analyze a sufficient number of elections to enable it to determine whether white bloc voting usually operates to defeat minority-preferred candidates." (PA-41). By restricting itself to only the elections offered by plaintiffs' expert Orey, *i.e.*, only those elections in which an African American ran, the district court was limited to six of the 14 primaries and five of the 14 general elections in the county since passage of the Voting Rights Act. *Id.* Unless one assumes that black voters could never have a preferred candidate in an election in which there is no African American candidate — an impermissible assumption — "the district court simply did not have before it sufficient evidence to determine whether the black-preferred candidates *usually* were defeated." (PA-41-42).

The Court of Appeals affirmed summary judgment for the county despite this mistake on the part of the district court, for two reasons. First, it was the plaintiffs' burden to offer data from a sufficient number of elections to show usual defeat of minority-preferred candidates.[2] (PA-42). Second, the court reviewed the

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2. Plaintiffs' proffer at summary judgment did not comport with the most basic principles of Rule 56. When defendant moved for summary judgment, the only evidence in the record concerning the success of minority preferred candidates was the testimony of plaintiffs' own expert stating that under any definition, minority preferred candidates won more often than not.

Where, as here, the nonmovant would bear the burden of proof at trial, the party moving for summary judgment has the burden not of producing evidence demonstrating the absence of a genuine issue of material fact, but of " 'showing' — that is, pointing out to the District Court — that there is an absence of evidence to support the nonmoving party's case." *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23 (1986). Once defendant made such a showing, the burden shifted to the plaintiffs to go beyond the pleadings

(Cont'd)

district court's determination of which candidates were preferred in the elections the plaintiffs had analyzed, and the success those candidates had achieved, and concluded that despite one error in mingling primary and general election results the district court had assessed the evidence correctly. (PA-54-68). In short, "[b]ased upon the limited data before the court, this conclusion [preferred candidates were not usually defeated] was fully supported even by plaintiffs' own expert witness. . . ." (PA-40). The secondary portion of plaintiffs' petition for certiorari takes issue with those conclusions.

(Cont'd)
and set forth specific facts establishing that there is a genuine issue for trial. *Id.* at 324. Plaintiffs failed to meet their burden. They could have offered evidence of additional elections to supplement a lacking record, but did not. They could have offered additional expert testimony if they felt that it would "clarify" the otherwise unmistakable conclusions drawn in Orey's deposition. They did not.

Where the record taken as a whole could not lead a rational trier of fact to find in favor of the nonmoving party, there is no "genuine issue" for trial within the meaning of Rule 56(c) of the Federal Rules of Civil Procedure. *Matsushita Elect. Industrial Co. v. Zenith Radio,* 475 U.S. 574, 587 (1986). If the nonmoving party fails to supplement the record to demonstrate the existence of a genuine issue, the standard set forth in Rule 56(c) is met, and summary judgment is mandatory. *Celotex,* 477 U.S. at 327.

REASONS FOR DENYING THE WRIT

I.

THE FOURTH CIRCUIT'S DECISION ON THE NUMBER AND TYPE OF ELECTIONS THAT MUST BE EXAMINED IN A SECTION 2 CASE IS NOT IN SUCH CONFLICT WITH *GINGLES* OR THE DECISIONS IN OTHER CIRCUITS AS TO REQUIRE REVIEW BY THIS COURT.

Plaintiffs argue that the Fourth Circuit has adopted a rigid rule for analyzing Section 2 claims that conflicts with *Gingles* and decisions in several other circuits. They say that the Fourth Circuit's "unprecedented" ruling that the trial court consider elections in which no minority candidate ran conflicts with Section 2's provision that the "extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered . . ." in determining a violation. 42 U.S.C. § 1973(b).

Plaintiffs read too much into the Court of Appeals' decision and exaggerate its conflict with other circuits. The Fourth Circuit has not circumvented *Gingles* but, rather, has followed its admonition to evaluate the circumstances of the individual case to determine how many and what kinds of elections must be reviewed. Moreover, it is painfully evident that even if the Section 2 analysis were limited to elections involving black candidates the plaintiffs still would lose.

In *Gingles* this Court said: "The number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances." *Gingles* at 57, n. 25. The court also made clear that the issue in a Section 2 case is the election history over time, saying "that the usual

predictability of the majority's success distinguishes structural dilution from the mere loss of an occasional election" *id.* at 51, that a voting rights claim of "vote dilution is distinct from the mere inability to win a particular election. . . ." *id.* at 57, and:

> Racial polarization should be seen as an attribute not of a single election, but rather of a polity viewed over time. The concern is necessarily temporal and the analysis historical because the evil to be avoided is subordination of minority groups in American politics, not the defeat of individuals in particular election contests.

Id. at 57, *quoting* Note, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act,* 94 Yale L. J. 189, 200, n. 66 (1984).

Here, the Court of Appeals considered the pertinent circumstances, especially the analysis by plaintiffs' expert, and determined that in this case more elections were needed to properly judge the "polity viewed over time." The circumstances justifying this conclusion included: (1) nearly 30 years had passed since enactment of the Voting Rights Act; (2) African American candidates had run in only six primaries and five general elections during that time; (3) the black support for African American candidates varied widely from election to election, from 12 percent to 42 percent to 57 percent to 95 percent and above (PA-22-32); and (4) plaintiffs' evidence from those few elections showed that, even when black candidates were running, black voters had given 99 percent plus support to white candidates seven times (PA-23, -25, -28, -31). In such circumstances, it was reasonable for the court to conclude that the preferred candidate of black voters would not necessarily always be African American, that black voters might have

preferred white candidates in other elections, and that the inclusion of those additional elections was necessary for the trial court to determine whether polarized voting "usually" resulted in the defeat of preferred candidates.

Contrary to plaintiffs' assertion that the Fourth Circuit has rejected the *Gingles* principle that analysis of vote dilution claims must be flexible and has "replaced it with a rigid test" (Petition, p. 12), the court explicitly stated that it would "leave to another day the question of precisely how many elections must be considered in order for a district court's conclusions to be adequately supported." (PA-53).

Neither does the Fourth Circuit decision preclude consideration under Section 2 of "[t]he extent to which members of a protected class have been elected to office. . . ." By holding that, under the circumstances of this particular case, the district court should have *also* considered elections in which there were no African American candidates, the Court of Appeals is not excluding evidence of the lack of success of black candidates, nor even saying that the white-only contests are entitled to the same weight. The court stated explicitly: "We do not decide here the extent to which, if any, white-white elections are deserving of less evidentiary weight than elections in which a minority candidate is on the ballot." (PA-51, n. 8).

Finally, the Fourth Circuit decision does not directly conflict with decisions from other circuits. No other circuit court has held that the trial court must exclude consideration of white-only elections. Other circuits have addressed only whether such elections have less probative value. And, when those courts sometimes have opined that white-only elections offer little help in resolving vote dilution claims, they have not had before them, as the Fourth Circuit had here, uncontroverted evidence that black voters had regularly given unanimous backing to white candidates.

Plaintiffs cite several cases from the Fifth Circuit and, admittedly, that court comes closest to saying white-only elections should not be considered at all. *See Westwego Citizens v. City of Westwego,* 946 F.2d 1109, 1119, n. 15 (5th Cir. 1991) (quoting its earlier opinion in the same case: "Evidence of black support for white candidates in an all-white field . . . tells us nothing about the tendency of white bloc voting to defeat black candidates."). Still, in *Westwego* no evidence of black support for white candidates was presented, and before the Section 2 suit was brought no black candidate had ever run for the town board, meaning there would have been no reference point for assessing the weight to be given black support of white candidates for the same office.

Similarly, in *Campos v. City of Baytown, Tex.,* 840 F.2d 1240, 1249 (5th Cir. 1988), *cert. denied,* 492 U.S. 905 (1989), no minority candidate had ever been elected to the city council despite cohesive minority support, again leaving no reference for properly weighing white-only elections. Additionally, in rejecting the city's argument that the court needed to consider white-only elections, the Fifth Circuit was responding not to a claim that the success of white candidates who had unanimous minority backing should be factored into the decision, but rather to the contention that "any time a candidate gets a majority of the minority votes he is the 'chosen representative' of the minority group." *Id.* at 1245.

The Fifth Circuit displayed a more receptive attitude toward white-only elections in *Overton v. City of Austin,* 871 F.2d 529 (1989). After observing that the trial court had focused only on election contests involving minority candidates, the Court of Appeals said "we do not criticize this methodology, although it is not the only permissible way to approach § 2 claims." *Id.* at 538.

The Tenth Circuit has accepted consideration of white-only elections, with the reservation that the trial court must be careful

in concluding that a white is a preferred candidate of minority voters:

> Although this court has accepted evidence of Anglo versus Anglo races on the ground such elections may be relevant to discern whether racially polarized voting is present, we cautioned the evidence is useful only "so long as one of the Anglo candidates can be considered a preferred candidate of the minority group." *Sanchez v. Bond,* 875 F.2d at 1495.

Sanchez v. State of Colorado, 97 F.3d 1313, 1320 (10th Cir. 1996), *petition for cert. filed,* (U.S. March 13, 1997). The evidence the Fourth Circuit had that a white could be the preferred candidate was that virtually all black voters had voted for white candidates seven times when there also were black candidates running.

In *Jenkins v. Red Clay Consol. School Dist. Bd. of Educ.*, 4 F.3d 1103, 1128 (3rd Cir. 1993), *cert. denied,* 114 S. Ct. 2779 (1994), the school board argued that the plaintiffs were required to analyze *all* elections, a position also rejected here by the Fourth Circuit ("we do not suggest that the district court need analyze every election since 1965. . . .") (PA-53). The Third Circuit said that it would be proper for the district court to consider evidence of white-only elections but that the trial court "must engage in a detailed, practical evaluation of the extent to which any particular candidate was, as a realistic matter, the minority voters' representative of choice." *Jenkins,* at 1129. Presumably, testimony from the plaintiffs' expert that a white candidate was the "strongest preferred" candidate of black voters would satisfy that test.

Decisions from three other circuits are even closer to the Fourth Circuit. The First Circuit Court of Appeals observed in *Uno v. City of Holyoke*, 72 F.3d 973, 988, n. 8 (1st Cir. 1995), that, while elections with minority candidates are especially probative, "evidence exhumed from 'white only' elections may still be relevant in assessing the totality of the circumstances in a vote dilution case, especially if it tends to rebut the evidence of cohesion or white bloc voting extracted from 'mixed' elections." In *Harvell v. Blytheville School Dist. # 5*, 71 F.3d 1382, 1386 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1876 (1996), the Eighth Circuit stated that a candidate could not be considered preferred "simply because the candidate is a member of the minority." The court explained: "Such stereotyping runs afoul of the principles embodied in the Equal Protection Clause." *Id.* Rather, "preferences of minority voters must be established on an election-specific basis, viewing all the relevant circumstances." *Id.* An election-specific determination is exactly the procedure followed here.

The Second Circuit recently faced directly the issue of white only elections in *N.A.A.C.P. v. City of Niagara Falls, N.Y.*, 65 F.3d 1002 (2nd Cir. 1995). The plaintiffs there contended that white-only elections were "an improper evidentiary source for the third *Gingles* prong in light of the other evidence in this case of racially polarized voting patterns [in elections with black candidates]." *Id.* at 1015. The court rejected that proposition decisively:

> But the [Voting Rights] Act does not delegitimate elections in which a substantial portion of a protected class expresses a preference for a candidate who is not a member of that class. The Voting Rights Act does not provide that race alone, to the exclusion of all other factors political and

> social, is the Rosetta Stone of an election. The statute does not require this species of racialism, and basic American constitutional principles make us recoil from any such idea.
>
> * * *
>
> We decline to adopt an approach precluding the possibility that a white candidate can be the actual and legitimate choice of minority voters. Such an approach would project a bleak, if not hopeless, view of our society — a view inconsistent with our people's aspirations for a multiracial and integrated constitutional democracy.

Id. at 1015-16. The court went on to find that the trial court had incorrectly identified some candidates as preferred when their support was significantly below that of other officeseekers, but nevertheless upheld the judgment for the city.

II.

THE FOURTH CIRCUIT CORRECTLY ANALYZED ELECTIONS IN WHICH BLACK CANDIDATES RAN.

Plaintiffs' second line of attack, contained in parts II and III of their argument, is that the Court of Appeals erred in its review of the elections in which African Americans ran by adopting impermissible "automatic and inflexible" "blanket rules" on which candidates would be considered preferred and by refusing to use the incumbency of black commissioner Jack O'Kelley to discount his repeated electoral success.

The first "blanket rule" with which plaintiffs disagree is

actually not a new rule but a restatement of the court's previous holding in *Collins v. City of Norfolk*, 883 F.2d 1232 (4th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990) (*Collins II*), with which plaintiffs later seem to agree. The rule is that a successful second or third choice of black voters is "automatically" — plaintiffs' word, not the court's — considered a preferred candidate if the unsuccessful first choice did not receive a significantly higher percentage of black votes. (Petition, p. 18). Surprisingly, after criticizing the Fourth Circuit's restatement of its holding in *Collins II* as contrary to the "flexible, fact-intensive" evaluation of electoral history required by Section 2, two pages later the plaintiffs turn around and commend the very same opinion because it "rejected the mathematical absolutism of finding successful candidates to be minority-preferred simply because they received over 50% of the minority votes." (Petition, p. 20).

As plaintiffs' second discussion of the rule indicates, *Collins II* adopted a sensible, common sense approach to the determination of preferred status in multi-seat races. If a candidate who is an undisputed preferred candidate of black voters loses, but other candidates win with essentially the same level of black support, those other candidates ought to be considered preferred as well. If the second and third choices lag significantly behind in their level of support, however, they are presumed not to be preferred, and the trial court should look more closely at their individual circumstances to see whether that is a correct conclusion.

The problem with the trial court's application of *Collins II* in this case was that the court automatically disqualified some successful white candidates as possible preferred candidates of black voters when they had less African American support than an unsuccessful black candidate, even though the differences were not great. For example, as the Fourth Circuit observed, in the 1972 Democratic Primary the district court did not consider

successful white candidate Long a preferred candidate with 84 percent of the black vote just because African American candidate Morris lost with 98 percent black support. (PA-57). In response, the Court of Appeals did exactly what plaintiffs urge, it called for a more individualized determination.

Plaintiffs' next dispute is with the Fourth Circuit's treatment of second and third choices then the first choice of black voters is successful. They disagree with the court's declaration that in multi-seat races, second and third choice candidates who finish behind the successful first choice of black voters, but who themselves receive majority black support, also should be considered preferred. Again, however, the Fourth Circuit has adopted a common sense approach to a complicated situation. In a multi-seat, multi-candidate election, say seven candidates running for three seats, if African American voters as a group did not have real preferences, one would expect their votes to be spread evenly among the seven candidates and that none would receive majority black support. If, on the other hand, a single candidate was strongly preferred over all others, African Americans would be more likely to single shot for that person and leave the others with few black votes. But, in the circumstance addressed by the Fourth Circuit, when black voters have chosen not to single shot but instead have coalesced in a majority behind another one or two candidates, it is proper and logical to consider those other candidates also to he preferred.

Interestingly, plaintiffs do not cite any specific election results which they believe the Fourth Circuit has misinterpreted because of its "blanket rules." The reason is obvious: The white candidates plaintiffs might want to have considered "second" and "third" choices received 99 percent plus black support according to their expert. In fact, in reviewing Mr. Orey's charts, the only times successful white candidates received a majority of black votes in elections in which black candidates won, those

white candidates, like the African American, received 99 percent plus black support. (PA-23, -25, -28).

Plaintiffs' third contention about the Fourth Circuit's analysis of the election data is that it incorrectly declared each white candidate who received 99 percent plus of the black vote in the general election as a preferred candidate, regardless of how African Americans voted in the primary. Their argument that general election results should be discounted based on primaries seems inconsistent with their position, adopted by the Fourth Circuit, that the results of primaries and general elections should not be aggregated but should be analyzed separately. (PA-65-67). Actually, the Court of Appeals significantly reduced the plaintiffs' burden by going on to say that Section 2 requires equal opportunity for both nomination *and* election, and that a violation exists if minority preferred candidates are usually defeated by white bloc voting at either stage. (PA-66). Under that test, a loss by a preferred candidate in the primary can establish a Section 2 violation even though other preferred candidates win the general election and take office. Plaintiffs are helped not at all here, though, because whether primary or general election results are counted, and whether they are aggregated or counted separately, the preferred candidates do not usually lose.[3]

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3. The Fourth Circuit also rejected plaintiffs' argument that it disregard those general election candidates who were not preferred in the primary on the grounds that such an analysis would require the court to look at the cause of minority support. The court said that *Gingles* foreclosed such an approach. (PA-63). Defendant disagrees and believes that it would be appropriate, at least, for the court to consider the effect of partisanship on the ability of black voters to elect candidates. *League of United Latin Amer. Citizens v. Clements*, 999 F.2d 831, 850-63 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 878; *Nipper v. Smith*, 39 F.3d 1494, 1525 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1795 (1995). In the present case it is African Americans' affiliation with the Democratic Party that presents the greatest barrier to their election to the Board of Commissioners.

All of plaintiffs' arguments about the Fourth Circuit's tests of "preferred" status ring hollow in light of Mr. Orey's testimony. Plaintiffs complain of the rigidity of the court's analysis, but their expert applied the most flexible analysis possible, recasting his definition of "preferred" each time it seemed headed to the wrong conclusion, and yet he never could come up with a meaning that did not wholly undermine the plaintiffs' case.

Plaintiffs' last argument is that the Fourth Circuit should have wholly discounted the success of black candidate Jack O'Kelley because he was initially appointed to office and then always ran as an incumbent. The fault with this argument is that plaintiffs never offered any evidence to support it. Contrary to the assertion in their petition that "the Fourth Circuit adopted a requirement that plaintiff present a statistical analysis of the effects of incumbency . . ." (Petition, p. 22), the court only used the plaintiffs' expert's failure to conduct any analysis as one explanation for not reversing the trial court. It was not just his analysis, but any other support for their position, that was missing.

Certainly, incumbency may be a special circumstance that diminishes the weight to be given certain electoral successes. *Gingles* at 57. But incumbency does not automatically and in all cases negate the import of a black officeholder's reelection. That would be a rigid rule that conflicts vith the flexible, fact-intensive assessment of elections so stressed by plaintiffs. Instead, the effect of incumbency must be shown. And, if incumbency can be used to discount an African American candidate's success, it should be considered to discount the loss of other black candidates to incumbents. *Nipper v. Smith,* 39 F.3d 1494, 1538-39 (11th Cir. 1994), *cert. denied,* 115 S. Ct. 1795 (1995).

CONCLUSION

Certiorari should be denied. The Fourth Circuit has not adopted the rigid rules seen by plaintiffs. The court has applied the teachings of *Gingles* to a case in which plaintiffs' own evidence was that, no matter how the analysis was sliced, the preferred candidates of black voters usually won. Plaintiffs' problem is not with the reasoning of the Fourth Circuit but with their own expert. Their argument is not that their evidence was rejected but that both the trial and appellate court accepted it.

Dated: April 7, 1997

Respectfully submitted,

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APPENDIX A — AFFIDAVIT OF RENA McADAMS DATED MAY 13, 1994 WITH EXHIBITS ANNEXED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

NO. 2:92 CV 614

ERNESTINE LEWIS, SYLVESTER J. LEWIS, AND MINNETTA E. HILL,

Plaintiffs,

v.

ALAMANCE COUNTY, NORTH CAROLINA, INCLUDING ITS BOARD OF COMMISSIONERS AND BOARD OF ELECTIONS,

Defendants.

AFFIDAVIT OF RENA McADAMS

Rena McAdams, being duly sworn, deposes and says:

1. I am over 18 years of age and am competent to testify as to the matters contained in this Affidavit.

2. I am a citizen and resident of Alamance County, North Carolina, and am the Supervisor of Elections for the Alamance County Board of Elections. I have held this position since 1985.

3. The Alamance County Board of Elections conducts all elections in Alamance County, including all federal, state, county and municipal elections. As Supervisor I am responsible for

managing the elections office, registering voters, publishing notices of election, preparing and printing ballots, training precinct officials, preparing registration reports and election abstracts, and otherwise generally overseeing the conduct of elections in the county.

4. I maintain election records for the county and am familiar with the election results for the Alamance County Board of Commissioners and Alamance County Board of Education, as well as municipal elections in Alamance County.

5. The Alamance County Board of Commissioners has five members elected in at-large elections for terms of four years. The terms are staggered so that three seats are up for election in years divisible by four (1992, 1996, etc.) and two seats are up for election in the intervening even-numbered years (1994, 1998, etc.). The elections are partisan elections in which nomination is by party primary. A candidate must receive at least 40% of the votes cast in the party primary to be nominated without a second primary.

6. The General Assembly enacted the 40% rule for party primaries in 1989, replacing the earlier majority-vote requirement for primaries. Except for this change, the present method of election to the Board of Commissioners has been in effect since 1942.

7. According to the 1990 census, the total population in Alamance County is 108,213 persons, of whom 86,373 (79.8%) are white and 20,822 (19.2%) are black. The total county voting age population is 84,538, of whom 68,636 (81.2%) are white and 15,190 (18.0%) are black.

Appendix A

8. As of April 12, 1990, the voter registration report closest to the 1990 census, there were 51,953 registered voters in the county, of whom 43,940 (84.6%) were white and 7,908 (15.2%) were black. At the close of registration in April of this year for the May 1994 primaries, there were 60,202 registered voters, of whom 50,495 (84.1%) are white and 9,326 (15.5%) black. Of the total number of registered voters, 59% are registered as Democrats, 32% as Republicans, and the remainder unaffiliated. Approximately 94% of the black voters in the county are registered as Democrats; black voters are nearly 25% of the registered Democrats.

9. Despite what the party registration numbers might suggest, Republican candidates receive strong support from the voters in Alamance County. Three of the five incumbent commissioners are Republicans, and 12 of the 18 candidates elected to the Board since 1980 have been Republicans. In that same time there have been four elections for president and governor, and the Republican candidate has carried Alamance County all four times for president and three times for governor.

10. Since 1972 the following black citizens have been candidates for the Alamance County Board of Elections, with the indicated results:

1972 - W.I. Morris lost in Democratic primary for 3 seats

1974 - Jack O'Kelley won general election for unexpired term of vacant seat

1976 - O'Kelley won in Democratic primary and general election for 3 seats

Appendix A

1978 - Ron Harris and Frank White, Sr., lost in Democratic primary for 2 seats

1980 - O'Kelley won in Democratic primary and general election for 3 seats; Theodore Howard lost in Democratic primary

1984 - J.A. Freeman won in Democratic primary for 3 seats, lost in general election (as did all 3 Democrats)

1986 - Because only 2 Democrats filed for the 2 seats, W.I. Morris was nominated without a primary; he lost in general election

1992 - Ron Torain lost in Democratic primary for 3 seats

11. Attorneys for Alamance County have provided me charts prepared by plaintiffs' expert, Mr. Orey, purporting to show how black and white citizens have voted in elections for county commissioner since 1972. I have reviewed those charts and have marked them to show how many seats were being elected each time, the party affiliation of candidates in general elections, and which candidates won. I also have corrected two names and the race of one candidate. Those charts are attached as Exhibits 1 through 11.

12. There are two separate school units in Alamance County, a Burlington City School Unit and an Alamance County School Unit. The boundaries for the city school system are not the same as the Burlington city limits, and the county school system includes some parts of the city. Currently 36,633 of the county's 6,020 registered voters, or just over 60% of the

registered voters in the county, live in the county school district. Of these voters, 13.4% are black, as contrasted with the current percentage of black registered voters in the county as a whole -- 15.5%.

13. The Alamance County Board of Education is elected in an at-large election for terms of four years. The elections for these seats are staggered so that no more than three seats are up for election at one time. Only voters residing in the county school unit may vote for the county school board. These nonpartisan elections are held in even-numbered years at the same time as party primaries for other county offices.

14. Over the past ten years, only two black candidates have run for election to the Alamance County Board of Education. Saundra (Sandy) Dixon has run four times and won each election. She was first elected in May 1984 to serve the final two years of an unexpired term. She was elected for four-year terms in 1986, 1990 and 1994. Anna M. Bass, the other black candidate, ran for the first time in 1994 and was elected. She finished first and Sandy Dixon second in this year's election for three seats. When Dixon and Bass are seated, two of the five members of the county school board will be black.

15. Black candidates have been elected to town councils in the municipalities of Burlington, Green Level, and Elon College.

16. David Maynard was elected in 1985, 1989, and 1993 to serve four-year terms of the Burlington City Council. As of October 1993, Burlington had a total voter registration of 22,572, of whom 17% were black.

17. Lawrence Slade was elected in 1991 and Sam Cousin was elected in 1987 to serve four-year terms on the Elon College Board of Alderman. As of October 1993, the town of Elon College had a total voter registration of 2,081, of whom 8% were black.

18. In 1991 three black citizens were elected to serve four-year terms and two were elected to serve two-year terms on the town council of the newly incorporated Green Level. As of October 1993, Green Level had a total voter registration of 844, of whom 89% were black.

19. Gilberta Mitchell, a black female, was appointed to the Alamance County Board of Elections in 1977 and she has served continuously as one of the three members on the board since that time. She served as board secretary from 1979 to 1985 and as chair of the board from 1993 to the present.

20. The Alamance County Board of Elections appoints a registrar and two judges, one Democrat and one Republican, for each of the county's 33 precincts. Currently, black citizens hold 10 of those 99 positions. Each of those precinct officials may register voters. The Board of Elections also appoints special registration commissioners to register voters throughout the county. These appointments generally are made from names submitted by the two major political parties. Currently, there are 39 such special registration commissioners, of whom 22 are black. Additionally, citizens may register to vote at the four county public libraries and with special registrars at Alamance Community College and Elon College and in the municipalities of Gibsonville and Mebane. High school students may register at the county's six high schools. Approximately half the people authorized to register voters in those locations are black. Finally,

any citizen may register to vote when renewing his or her driver's license. Although the exact number of special registration commissioners, and the percentage of black citizens holding the various positions, will vary from year to year, the current numbers are about the same as they have been in recent years.

THIS the 13th day of May, 1994.

s/ Rena McAdams
Rena McAdams

Sworn to/Affirmed and subscribed before

me this 13th day of May, 1994.

s/ Sheryl Evans Bullis
Notary Public

My Commission Expires: 12-29-96

1972 Democratic primary for county commissioner (3 seats)

Candidate	Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Long W	.71	.84	.36	.42
Small	.05	.08	.11	.13
Tate	.08	.09	.32	.37
Fleming W	.25	.29	.45	.51
Horne W	.14	.16	.46	.53
Johnson	.04	.05	.30	.35
Morris*	.83	.98	.13	.16
R^2 = .79				

*=Black candidate

1974 General election for county commissioner

Candidate		Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
J.B. Long (D)		.99+	.99+	.32	.35
Newlin, H.(D)	W	.99+	.99+	.42	.47
Brady (R)		0	0	.38	.44
~~Dantely~~ Danieley (R)	W	0	0	.46	.52
Shoffner (R)		0	0	.38	.43
O'Kelley* (D)	W	.99+	.99+	.36	.40
R^2 = .44					

2 seats

1 seat (vacancy)

*=Black candidate

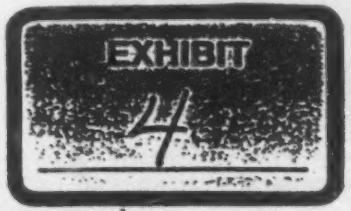
Appendix A

(3 seats)

1976 Democratic primary for county commissioner

Candidate		Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Andrews		.07	.10	.36	.42
Fleming	W	.33	.47	.45	.52
Moseley		.11	.16	.39	.45
Paris	W	.11	.16	.41	.48
Thomas		.05	.07	.18	.21
O'Kelley*	W	.79	.99+	.38	.44
R^2 = .84					

*=Black candidate



1976 General election for county commissioner (3 seats)

Candidate	Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Fleming (D) W	.99+	.99+	.52	.55
O'Kelley* (D) W	.99+	.99+	.52	.55
Paris (D) W	.99+	.99+	.51	.54
Alcon (R)	0	0	.41	.43
Campbell (R)	0	0	.35	.37
Teague (R)	0	0	.38	.40

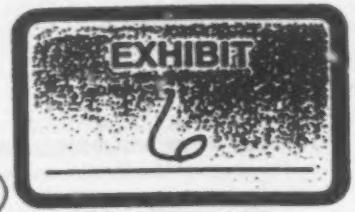
R^2 = .57

*=Black candidate

1978 Democratic primary for county commissioner (2 seats)

Candidate	Votes by blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Newlin W	.44	.60	.54	.67
Rogers	.06	.08	.18	.22
Warren W	.05	.07	.45	.56
White *	.09	.12	.09	.11
Harris*	.58	.78	.17	.21
R^2 = .79				

*=Black candidate



1980 Democratic primary for county commissioner (3 seats)

Candidate	Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Fleming	.50	.57	.30	.37
McLean	.02	.02	.31	.38
Moser W	.00	.00	.36	.44
Paris W	.42	.48	.36	.44
Howard*	.37	.42	.14	.18
O'Kelley* W	.99+	.99+	.36	.44
R^2 = .77				

*=Black candidates

1980 General election for county commissioner (3 seats)

Candidate		Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Moser (D)		.93	.99+	.36	.38
Paris (D)	W	.98	.99+	.37	.39
Alcon (R)	W	0	0	.58	.62
Crenshaw (R)		0	0	.51	.54
Rosencrans (R)		0	0	.42	.45
O'Kelley* (D)	W	.97	.99+	.41	.44
R^2 = .76					

*=Black candidate

1984 Democratic primary for county commissioner (3 seats)

Candidate	Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Bason	.09	.11	.21	.27
Ham	.06	.08	.13	.17
Utley	.00	.00	.27	.35
Holt W	.15	.19	.30	.39
Paris	.40	.50	.24	.31
~~Stanford~~ Thompson W	.32	.40	.28	.36
Freeman* W	.78	.98	.27	.35
R^2 = .73				

*=Black candidate

1984 General election for county commissioner (3 seats)

Candidate		Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Holt (D)		.60	.69	.32	.36
Thompson (D)		.75	.86	.25	.28
Alcon (R)	W	.03	.03	.50	.57
Allred (R)	W	0	0	.56	.64
Barbour (R)	W	0	0	.45	.51
Freeman* (D)		.83	.95	.21	.24
R^2 = .91					

*=Black candidate

1986 General election for county commissioner (2 seats)

Candidate	Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Bennett (D) W	.86	.99+	.40	.46
Sharpe (R)	0	0	.53	.60
Teague (R) W	0	0	.55	.63
Morris* (D)	.40	.57	.17	.19
R^2 = .67				

*=Black candidate

(3 seats)

1992 Democratic primary for county commissioner

Candidate		Votes by Blacks	Rollon by Blacks	Votes by Whites	Rollon by Whites
Booth		.15	.19	.11	.15
Ingle		.18	.22	.20	.28
Meredith	W	.20	.25	.20	.28
Moorefield	W	.27	.33	.29	.40
Scott	W	.38	.47	.33	.46
Walters		.09	.11	.14	.19
Torain*		.60	.74	.06	.08
R^2 = .89					

*=Black candidate

Appendix A

APPENDIX B — EXCERPTS OF DEPOSITION OF BYRON OREY

[Commencing at page 59]

* * *

Q Would you start with Exhibit No. 1 and go through Exhibit Nos. 1 through 11 and identify for me the persons you would consider to be the preferred candidates of black voters in each election?

A Okay. In 1972, there was a vote for three, so Long, Morris, and Fleming would be the candidates in which blacks preferred.

Q So your testimony is that in the 1972 Democratic primary the preferred candidates of black voters are Long, Fleming, and Morris?

A That's correct. And I don't have before me the number of seats, so — for each election that was available.

Q And turning to Exhibit No. 2, who would you identify as the preferred candidates of black voters?

A Long, Newlin, and O'Kelley.

[60] Q This is the 1974 general election for county commissioner?

A That's correct.

Q Exhibit No. 3, which is the 1976 Democratic primary for county commissioner?

A Is that a vote for two elections?

Q I believe there are three seats.

A Three seats in 1976? O'Kelley — I'll just give you the ranking of the top three. O'Kelley, Fleming, and tie between Moseley and Paris.

Q Who would you consider to be the preferred candidates of black voters in the 1976 Democratic primary?

A I beg your pardon?

Q Who would you consider to be the preferred candidates of black voters in the 1976 Democratic primary?

A O'Kelley, Moseley and Paris a tie, and Fleming.

Q So you would consider all four to be preferred candidates of black voters?

A That's correct.

Q Exhibit No. 4 would be the 1976 general election for county commissioner. Who would you consider to be the preferred candidates of black voters?

A Before proceeding with the 1976 Democratic primary —

Q You're going back to Exhibit No. 3?

[61] A That's correct. Between Moseley and Paris, because

Appendix B

I rounded to the second decimal point, or the hundredth column, it can be determined, but based on the estimates that I have here you cannot determine the difference. So depending on other columns, we can determine because they can only actually prefer three candidates because there are only three seats available, so there may be a difference. I'm not saying that there is a difference, but there may be a difference — or there should be a difference between Moseley and Paris.

Q And rounded off, what your chart shows is that Moseley and Paris each received approximately 16 percent of the votes of black voters in the 1976 Democratic primary?

A Right.

Q And you would consider one or both of them to be preferred candidates of black voters even though they only received 16 percent of the votes of black voters?

A In their ranking of — you're right. In the ranking amongst other candidates.

Q And that's your definition of a preferred candidate?

A Those preferred amongst others, according to the [62] number of seats.

Q Would you consider Moseley and Paris to be the candidates of choice of black voters?

A They would be amongst those mentioned as preferred, so in terms of preferred choice, I would consider it synonymous.

Appendix B

Q So you would consider "preferred" and "candidate of choice" to be synonymous?

A That's correct. Well, actually I would combine the word as "preferred choice" or combine the phrase as "preferred choice."

Q So however one phrased it, whether the question was whether they were the preferred candidates of black voters or the candidates of choice of black voters, you would say that with 16 percent of votes of black voters that either Moseley or Paris or both would fit that category?

A On average, yes.

Q I'm not sure what you mean by "on average."

A On average I would consider these to be the preferred candidates of choice amongst the other candidates.

Q What do you mean by "on average"?

A No individual precinct. I'm not speaking with regard to any individual precinct, but blacks on average [63] prefer these particular candidates.

Q The 1976 general election, who would you consider the preferred candidates or the candidates of choice of black voters?

A Fleming, O'Kelley, and Paris.

Q 1978 Democratic primary, who would you consider the preferred candidates of black voters?

A Was this an election for two?

Q My understanding is that there were two seats up for election in 1978.

A Harris and Newlin.

Q 1980 — just a second. I've lost track of my numbers here. The 1978 Democratic primary was Exhibit No. 5; 1980 Democratic primary was Exhibit No. 6. And who would you consider to be the preferred candidates or candidates of choice of black voters?

A And this was an election for two or three?

Q Three seats, is my understanding.

A O'Kelley, Fleming, and Paris.

Q And Exhibit No. 7 is the 1980 general election for county commissioner.

A Moser — as a preferred choice of the black community, or black voters, Moser, Paris, and O'Kelley.

Q Exhibit No. 8 would be the 1984 Democratic primary [64] for county commissioner. Again, I believe, three seats were up. Who would you consider to be the preferred candidates of black voters?

A Freeman, Paris, and Stanford, which is actually — yeah, Stanford.

Q Actually it's —

A Thompson.

Q Thompson.

A Right.

Q Stanford Thompson, I think.

A Uh-huh [yes].

Q In the Exhibit No. 9 is the 1984 general election for county commissioner. Who would you consider to be the preferred candidates?

A Freeman, Thompson, and Holt.

Q And Exhibit No. 10 is the 1986 general election for county commissioner. Who would you consider to be the preferred candidates?

A Bennett and Morris.

Q And Exhibit No. 11 is the 1992 Democratic primary. Who would you consider to be the preferred candidates for black voters or the candidates of choice?

A Torain, Scott, and Moorefield.

Q Okay, if you will go back through those exhibits now, [65] and you may want to take a pencil and mark, but I'll leave it up to you. This is going to be a fairly long question.

Witness: Are we off the record for a second?

Mr. Crowell: Yes.

Witness: Let me just take a break for just one second.

Mr. Crowell: Oh, okay.

[Recess 12:22 p.m. - 12:23 p.m.]

Q Actually, I can break this up into different questions. Looking at Exhibit No. 1, in the 1972 Democratic primary, my understanding is that there were three seats available for nomination, and that of the three candidates you identified as preferred candidates or candidates of choice of black voters — Long, Fleming, and Morris — Long and Fleming were nominated; Morris was not.

A Okay.

Q I want to ask you a question based on these statements and these assumptions, so as I go through these if at any point you have any questions about whether the statements or assumptions are correct, stop me and we'll discuss it.

On Exhibit No. 2, concerning the 1974 general [66] election for county commissioner, you testified that Long, Newlin, and O'Kelley were the preferred candidates or candidates of choice of black voters. My information is that all three were elected.

A Uh-huh [yes].

Mr. Van Noppen: Long, Newlin, and O'Kelley?

Mr. Crowell: Yes.

Q Were you aware that in 1974 that there were only two seats whose terms were expiring in 1974, but there was a separate election to fill the last two years of an unexpired term and that Mr. O'Kelley was running a separate election for that seat?

A No. I have Dantley finishing third.

Mr. Crowell: Let's go off the record for a second.

[Off-the-Record Discussion 12:26 p.m. - 12:27 p.m.]

Q The 1974 general election on Exhibit No. 2, you identified the preferred candidates or candidates of choice of black voters to be Long, Newlin, and O'Kelley. My understanding is that the three candidates who were elected were O'Kelley, Newlin, and Dantley, so that two of the three candidates you identified as preferred candidates were elected.

In the 1976 Democratic primary, looking at [67] Exhibit No. 3, you identified O'Kelley, Fleming, and Moseley and/or Paris as the preferred candidates or candidates of choice of black voters. My information is that the three candidates who were nominated in that Democratic primary were Fleming, O'Kelley, and Paris, all of whom you identified as preferred candidates or candidates of choice of black voters.

In Exhibit No. 4, you identified as the preferred candidates in the 1976 general election Fleming, O'Kelley, and Paris. My information is that all three were elected.

Appendix B

In the 1978 Democratic primary for county commissioner on Exhibit No. 5, you identified as the preferred candidates in the Democratic primary Harris and Newlin. My information is that they were both nominated — excuse me, that Newlin was nominated and Harris was not.

In the 1980 Democratic primary for county commissioner, Exhibit No. 6, you've identified as the preferred candidates or candidates of choice of black voters Fleming, Paris, and O'Kelley, and my information is that two of the three of those, Paris and O'Kelley, were in fact nominated.

A Say that again.

[68] Q That Paris and O'Kelley were in fact nominated.

A Okay.

Q In Exhibit No. 7, the 1980 general election for county commissioner, you've identified as the preferred candidates O'Kelley, Moser, and Paris. My information is that two of the three of those, Paris and O'Kelley, were in fact elected in that election.

In the 1984 Democratic primary for county commissioner, Exhibit No. 8, you identified as the preferred candidates Paris, Thompson, and Freeman. My information is that two of the three of those, Thompson and Freeman, were in fact nominated in that primary.

Exhibit No. 9 is the 1984 general election for county commissioner. You identified as the preferred candidates of black voters Holt, Thompson, and Freeman, and my information

is that those were the three Democratic nominees in the general election and that none of the three was elected. There was a Republican sweep in that year.

Exhibit No. 10 is a 1986 general election for county commissioner. You've identified Bennett and Morris as the preferred candidates or candidates of choice of black voters, and my information is that [69] Mr. Bennett was elected; Mr. Morris was not.

And, finally, in the 1992 Democratic primary for county commissioner, in Exhibit No. 11, you've identified as the preferred candidates of black voters Mr. Moorefield, Mr. Scott, and Mr. Torain. And my information is that Mr. Moorefield and Mr. Scott were in fact nominated in that primary, and Mr. Torain was not.

Now, based on your testimony on that information, would you say — would you agree that since 1972 that generally the preferred candidates or candidates of choice of black voters have been elected in elections for the Alamance County Board of Commissioners?

Mr. Van Noppen: Objection.

Q You may still answer.

A I decline.

Q I don't think you can decline.

A First, I would measure whether or not preferred candidates were elected differently.

Q I was just using the people you identified as the preferred candidates. Are you saying that you've changed your mind as to who the preferred candidates are?

[70] A No, but in terms of determining whether or not the opportunity to elect certain candidates is present cannot be explained based on what you've just identified as the current scenario.

Q Let me ask the question another way. Would you not agree that in the 1972 Democratic primary two of the three candidates you identified as the preferred candidates or candidates of choice of black voters were elected — won the election?

A They did.

Q Would you not agree that in the 1974 general election for county commissioner in Exhibit No. 2 that two of the three candidates you identified as preferred candidates of black voters were elected?

A They were.

Q Looking at Exhibit No. 3, would you not agree that in the 1976 Democratic primary all three of the candidates that you identified as the preferred candidates or candidates of choice of black voters were nominated?

A That's correct.

Q Looking at Exhibit No. 4, the 1976 general election for county commissioner, would you not agree that all three

candidates that you identified as the preferred [71] candidates or candidates of choice of black voters were elected?

A That's correct.

Q Looking at Exhibit No. 5, the 1978 Democratic primary for county commissioner, would you not agree that both candidates that you identified as the preferred candidates or candidates of — excuse me, that one of the two candidates you identified as preferred candidates or candidates of choice of black voters were nominated?

A I agree.

Q Looking at Exhibit No. 6, the 1980 Democratic primary for county commissioner, would you not agree that two of the three candidates that you identified as the preferred candidates or candidates of choice of black voters were nominated?

A I agree.

Q Looking at Exhibit No. 7, the 1980 general election for county commissioner, would you not agree that two of the three candidates that you identified as the preferred candidates or candidates of choice of black voters were elected?

A I agree.

Q Looking at Exhibit No. 8, would you not agree that [72] two of the three candidates that you identified as the preferred candidates or candidates of choice of black voters were in fact nominated?

A I agree.

Q Looking at Exhibit No. 9, would you not — I assume you would agree that none of the candidates that you identified as the preferred candidates of black voters were elected in the 1983 general election?

A That's right.

Q Looking at Exhibit No. 10, the 1986 general election for county commissioner, would you not agree that one of the two candidates that you identified as the preferred candidate of black voters was elected?

A That's correct.

Q And finally, looking at Exhibit No. 11, would you not agree that two of the three candidates that you identified as the preferred candidates or candidates of choice of black voters were elected — were nominated?

A That's correct.

Q Would you not agree, then, that from 1972 through 1992 in primaries and elections for county commissioner in the Alamance County that 20 of the 31 candidates that you identified as the preferred [73] candidates or candidates of choice of black voters were nominated or elected?

A You have to take into consideration the intensity of the preference.

Q Would you not agree that from 1972 through 1992 in

the primaries and general elections for Alamance County Board of Commissioners that you analyzed, that 20 out of the 31 candidates that you have identified as the preferred candidates or candidates of choice of black voters won their elections?

A Of those identified, if that's the aggregate, that's correct.

Q So would you not agree that from 1972 through 1992 that two out of three times the preferred candidates or candidates of choice of black voters have won elections from the Alamance County Board of Commissioners?

Mr. Van Noppen: Objection.

A I would have to analyze it based on the preference or the intensity because that was not a majority in certain cases, so a minority actually would have provided a preference. Thus, it would not be representative of the entire black community.

Q Are you saying that you now want to change your [74] testimony as to who the preferred candidates of black voters were?

A Well, I would say that the preference is based on intensity, and it's not merely based on ranking but intensity of those rankings.

Q Are you saying that you were mistaken earlier when you identified those 31 candidates as the preferred candidates or candidates of choice of the black community?

A I would say that it depends. That preference is a continuum, and it depends on the intensity of that continuum. It depends on how you're defining "preference."

Appendix B

Q Well, I asked you to define who the preferred candidates were and who the candidates of choice were, and you identified those individuals, so those were the — that was the definition I'm using. Are you now saying that that was incorrect?

A Well, the definition would be somewhat broader than just a simple ranking.

Q How would you define who is a preferred candidate or candidates of choice of black voters?

A The preferred choice of a particular group would be based on — it would be based on a continuum of [75] preference. Preference is based on a continuum from weak or no preference to strong preference, and that continuum can range from zero to one, with one being an absolute preference.

Would you please define "preference" for me?

Q I believe we're here to get your testimony.

A I want to make sure I answer the question accurately.

Q Well, my question to you — let's go back to Exhibit No. 1, the 1972 Democratic primary for county commissioner. Who would you consider to be the preferred candidates or candidates of choice of black voters in the 1972 Democratic primary?

A Would you define "preferred"?

Q Well, you previously testified that one of the purposes of your analysis was to determine who the preferred candidates of black voters were, so I assumed that you had some standard of definition in your mind to make that determination.

Mr. Van Noppen: Objection.

Q Are you telling me that you have no standard or definition for what's a preferred candidate or candidate of choice?

A I would like for you to further expound on your definition so that I can answer your question [76] accurately, because we may not agree.

Q I'm not here as the expert to testify about who are the preferred candidates or not. I'm here to find out what your opinion is on that, because presumably the reason you're here is that you may testify at trial as to who were the preferred candidates or candidates of choice, and in fact the plaintiffs have responded to interrogatories and identified such candidates apparently based on your analysis. So what we're here for is to find out your opinion as to who were the preferred candidates or candidates of choice.

Mr. Van Noppen: Objection.

Q Are you telling me that you do not know how to define who is the preferred candidate or candidate of choice?

A Preferred candidate would be based on a continuum, and that continuum would determine whether or not there was zero preference — ranging from zero preference to weak preference to strong preference. So in terms of absolute preference, we cannot say that they — the community on average chose a particular candidate.

Q Do you understand one of the issues in this lawsuit to be whether under the present election method black [77] voters have usually been able to elect candidates of choice?

Appendix B

A Certain candidates.

Q Do you understand that to be one of the issues in the lawsuit, whether under the present election method black voters have been able to elect candidates of their choice?

A Unable or able?

Q Able.

A I understand it to be that black voters are currently unable to —

Q Well, the issue for the court — isn't one of the issues for the court, one of the crucial issues, whether black voters have been able to elect candidates of their choice under the present election method?

A I would say that one of the primary issues is whether or not black voters have been unable to elect candidates of their choice.

Q Well, I think it's saying the same thing. You're using double negatives, but it's saying the same thing.

A Well, actually not, because in terms of preference a candidate may be preferred but not strongly [78] preferred, and an individual may vote a full ticket but not have a strong preference for a particular candidate, but because he or she may be considering his civic duty or whatever his reason or rationale for voting, he or she may vote a full ticket. But that does not take into consideration that preference of the entire electorate, or the entire black electorate in this case. So preference would be very, very important in this case.

Q Well, whether you state the issue in terms of whether black voters are able or unable to elect candidates of their choice, the crucial point, is it not, is how candidates of choice of black voters have faired in elections under the present election method.

A Certain candidates, right.

Q Well, candidates of choice.

A Strong, preferred choice.

Q Is that how you understand the issue to be, whether under the present election method black voters have been able to elect strong, preferred candidates of choice?

A I understand it to be that black voters have been unable to elect strong candidates of choice.

Q Well, the plaintiffs' claim is that they've unable [79] to, and that's the issue for the court to decide.

A Right.

Q And I'm not worried about the word "able" or "unable." It's just the —

A Well, I think the connection here is vote dilution, and in my understanding of past cases vote dilution has been a critical issue, whether or not a particular group's —

Q How do you determine whether there has been vote dilution?

A When one particular group votes as a block and, coupled with an election scheme, inhibits one particular group from electing a particular candidate of choice.

Q And how do you define a "candidate of choice"?

A A candidate of choice would be a candidate that is strongly preferred by a group.

Q And "strongly preferred" means what?

A I would say more than 51 percent.

Q Okay. Let's go back through the exhibits. Starting with Exhibit No. 1, who would you identify as the candidates of choice of black voters in the 1972 Democratic primary?

A The preferred candidate of choice?

[80] Q Whatever the definition of candidate of choice is that you are now using.

A My preferred candidate of choice definition would remain the same, but in terms of preference, as stated earlier, it is based on a preference or it is based on a continuum. So although we have a ranking of a preferred candidate, that does not necessarily represent the entire electorate from the black community on average.

Q All I'm trying to find out is if you were called upon to testify, and were called upon to testify and give an opinion on the issue of whether black voters have been able to elect candidates of choice in Alamance County under the present

election method, who you would identify as the candidates of choice?

A I would identify those candidates of choice as those receiving the highest percentage of votes from the black community, but that is based strictly on preference, so in order to represent or achieve an estimate that represents the entire — or the average black community — I would suggest that we use some threshold or preference.

Q Do you believe that under the present election method that black voters in Alamance County have been unable [81] to elect their candidates of choice to the Board of Commissioners?

A I would suggest that on average the black electorate has been unable to elect candidates in which they strongly prefer, on average. I would suggest that there is a presence of vote dilution.

Q And your basis for saying that there's vote dilution is what?

A That when whites vote as a block and do not support certain candidates that are strongly preferred by the black community, then because it is an at-large election blacks aren't able to elect the strong, preferred candidate of their choice.

Q Let's start with Exhibit No. 1. Who would you identify as the strong, preferred candidates of black voters?

A Long and Morris.

Q And you would agree that Mr. Long was nominated and Mr. Morris was not?

A Right.

Q Looking at Exhibit No. 2, who would you identify as the strong, preferred candidates of black voters?

A Long, Newlin, and O'Kelley.

Q And you would agree, would you not, that two of those [82] three strongly preferred candidates were elected in the 1974 general election?

A That's correct.

Q Looking at Exhibit No. 3, who would you identify as the strongly preferred candidates of black voters?

A O'Kelley.

Q And you would agree, would you not, that Mr. O'Kelley was nominated in the 1976 Democratic primary?

A That's correct.

Q Looking at Exhibit No. 4, the 1976 general election, who would you identify as the strongly preferred candidates of black voters?

A Fleming, O'Kelley, and Paris.

Q And you would agree, would you not, that all three of those were in fact elected?

A That's correct.

Q Looking at the 1978 Democratic primary, who would you identify as the strongly preferred candidates of black voters?

A Harris and Newlin.

Q And you would agree, would you not, that Mr. Newlin was nominated?

A That's correct.

Q The 1980 Democratic primary for county commissioner, [83] who would you identify as the strongly preferred candidates of black voters?

A O'Kelley and Fleming.

Q And you would agree, would you not, that Mr. O'Kelley was nominated in that primary?

A That's correct.

Q In 1980 general election for county commissioner, who would you identify as the strongly preferred candidates?

A O'Kelley — in the 1980 general?

Q Yes. Exhibit No. 7.

A O'Kelley, Paris, and Moser.

Q And you would agree, would you not, that Mr. O'Kelley and Mr. Paris were elected?

A That's correct.

Q The 1984 Democratic primary for county commissioner, who would you identify as the strongly preferred candidates of black voters?

A Freeman.

Q And you would agree, would you not, that Mr. Freeman, was in fact nominated in that primary?

A Yes.

Q Looking at Exhibit No. 9, in the 1984 general election for county commissioner, who would you [84] identify as the strongly preferred candidates of black voters?

A Freeman, Thompson, and Holt.

Q And you would agree that in the Republican sweep that year none of those three Democrats was elected?

A That's correct.

Q In the 1986 general election for county commissioner, who would you identify in Exhibit No. 10 as the strongly preferred candidates of black voters?

A Bennett and Morris.

Q And you would agree that Mr. Bennett was elected but Mr. Morris was not?

A That's correct.

Q And in the 1992 Democratic primary for county commissioner, in Exhibit No. 11 who would you identify as the strongly preferred candidates of black voters?

A Torain.

Q And Mr. Torain was not nominated?

A That's correct.

Q And you would agree, then, that of the 22 candidates that you identified as the strongly preferred candidates of black voters for Alamance County commissioner between 1972 and 1992, that 13 won their [85] elections?

A Assuming that that number is correct, the addition of them.

Q So would you not agree that from 1972 to 1992 more often than not black voters have been able to elect their strongly preferred candidates of choice?

A They have been able to elect strong preferred candidates but not the strongest preferred candidates.

Q Are you creating a new category now entitled strongest preferred candidate?

A I said it's a continuum between no preference to strongest preference.

Appendix B

Q If you were trying to determine the ability of black voters to elect candidates of choice, how would you define what a candidate of choice is?

A A candidate of choice would be based on the ranking of a candidate in a multiseat election, assuming we have a multiseat election, based on strong preferences.

Q Have you not just identified the people for whom black voters had those strong preferences?

A That's correct.

Q So you would agree that from 1972 to 1992 that more [86] often than not the candidates for whom black voters had strong preferences were elected?

A I would say that the candidates with strong preferences were elected, not taking into consideration the strongest candidates.

Q Going back to Exhibit No. 1, who would you identify as the strongest preferred candidates of black voters?

A Morris.

Q Mr. Morris was not nominated. Exhibit No. 2, who would you identify as the strongest preferred candidates?

A Long, Newlin, and O'Kelley.

Q Mr. Newlin and Mr. O'Kelley were elected. The 1976 Democratic primary, who would you identify as the strongest preferred candidates?

A O'Kelley.

Q And Mr. O'Kelley was nominated. In 1976 who would you identify as the strongest preferred candidates?

A Fleming, O'Kelley, and Paris.

Q And all three were elected? Exhibit No. 5, the 1978 Democratic primary, who would you identify as the strongest preferred candidates?

A Harris.

[87] Q Mr. Harris was not nominated. 1980 Democratic primary, Exhibit No. 6, who would you identify as the strongest preferred candidates of black voters?

A O'Kelley.

Q Mr. O'Kelley was nominated. The 1970 general election, who would you identify as the strongest preferred candidates of black voters?

A O'Kelley, Paris, and Morris.

Q And Mr. O'Kelley and Mr. Paris were elected, is that correct?

A Right.

Q Exhibit No. 8, the 1984 Democratic primary for county commissioner, who would you identify as the strongest preferred candidates of black voters?

A Freeman.

Q And Mr. Freeman was in fact nominated, was he not?

A That's correct.

Q Exhibit No. 9, the 1984 general election for county commissioner, who would you identify as the strongest preferred candidates of black voters?

A Freeman.

Q Mr. Freeman was not elected, as were none of the Democrats that year. The 1986 general election for county commissioner, Exhibit No. 10, who would you [88] identify as the strongest preferred candidates of black voters?

A Bennett.

Q And Mr. Bennett was in fact elected, was he not?

A That's correct.

Q And Exhibit No. 11, who would you identify as the strongest preferred candidate of black voters in the 1992 Democratic primary?

A Torain.

Q And Mr. Torain was not nominated, was he?

A That's correct.

Q So would you testify, then, that from 1972 to 1992 that 11 of the 17 strongest preferred candidates of black voters in fact won their elections?

A That's correct.

Q Would you not agree, then, that from 1972 to 1992 that usually black voters have been able to elect their strongest preferred candidates for the Alamance County Board of Commissioners?

Mr. Van Noppen: Objection.

A Including the elections with O'Kelley. Assuming that we include those elections with O'Kelley, because O'Kelley was one candidate and one individual that has been —

[89] Q Is there some reason not to include the elections for O'Kelley?

A Because they're more than one election that include O'Kelley whereby O'Kelley is the strongest preferred candidate.

Q For some reason is he not supposed to count?

A I mean, more weight will allocated to that percentage based on that one particular candidate.

Q Well, 11 out of the 17 times since 1972 in which you have identified candidates strongly preferred by black voters, those candidates have won, is that not correct?

A That's correct.

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